

# AMENDMENT OF ASSIGNMENT OF ACCOUNTS RECEIVABLE STATUTE

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Senate Bill No. 235, which became effective September 7, 1957, clarifies the meaning of the Ohio Assignment of Accounts Receivable Statute in a significant respect. The Bill makes it clear that an assignee of accounts receivable under a written assignment for value made at any time within the effective period of a notice of assignment or notice of renewal is "protected" as to such accounts,<sup>1</sup> *even if the accounts arise under a contract which was made after the filing of the applicable notice of assignment or notice of renewal.*

The Bill makes very explicit what clearly appears to have been the original intent of the statute which it amends.<sup>2</sup> Ohio accounts receivable legislation, since the passage of the 1941 statute, has been governed by the principle of "notice filing." "Notice filing" requires the public filing of a simple notice indicating that a specified person has entered or contemplates entering a secured financing transaction or transactions with another specified person. The public notice need not identify any specific property as subjected or to be subjected to a security interest. However, such a notice affords adequate protection to those dealing with the assignor by notifying them that further inquiry into the assignor's existing financing arrangements is required. The public notice required to be filed under the Ohio Accounts Receivable Statute is termed a "notice of assignment" and need set forth no facts other than that:

The undersigned assignor is assigning contemporaneously herewith or intends to assign one or more accounts receivable to the undersigned assignee.<sup>3</sup>

The period of effectiveness of a notice of assignment is three years after the date of its filing, and this period may be extended for successive three-year periods by the filing of "notices of renewal."<sup>4</sup>

The principal advantage of notice filing in accounts receivable financing lies in the convenience with which the parties to financing

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<sup>1</sup> The rights of a "protected assignee" are set forth in OHIO REV. CODE §§1325.04 and 1325.07.

<sup>2</sup> See Folkerth, *Accounts Receivable Legislation*, 12 OHIO ST. L.J. 333 (1952), commenting on the 1951 revision of the Ohio Assignment of Accounts Receivable Statute:

As in the previous law, the notice is effective for all assignments of accounts receivable which take place between the parties during the three year period for which the original notice is effective.

<sup>3</sup> OHIO REV. CODE §1325.01(H).

<sup>4</sup> OHIO REV. CODE §1325.03.

transactions may comply with the statutory requirements. Substantial inconvenience and expense would be incurred by lenders and borrowers were they required to file a separate notice each time an assignment of one or more contract rights or accounts was made. The drafters of the Uniform Commercial Code (which was one of the principal sources of the 1951 revision of the Ohio statute) have stated in support of the adoption of "notice filing" in the Code:

"Notice filing" has proved to be of great use in financing transactions involving inventory, accounts and chattel paper, since it obviates the necessity of refileing on each of a series of transactions in a continuing arrangement where the collateral changes from day to day.<sup>5</sup>

Despite the clear purpose of notice filing to eliminate the need to refile a notice each time the collateral changes, a Texas appellate court in 1951, in *Keeran v. Salley*,<sup>6</sup> construed the Texas Assignment of Accounts Receivable Statute (which adopts the system of notice filing)<sup>7</sup> as limiting the scope of protection afforded by the publicly filed notice to only those assigned accounts which arise under contracts which were in existence at the time of the filing of the notice. The court based its decision on an interpretation of the statutory definition of the term, "account" or "account receivable." In the Texas statute this term was defined in part to mean "an existing or future right to the payment of money presently due, or to become due *under an existing contract*."<sup>8</sup> The court held that the point of time at which a contract must be "existing" for an assignment of accounts arising thereunder to be protected is the time of the filing of the statutory public notice. This holding, of course, excluded from the coverage of the statute, assigned accounts arising under contracts "existing" at the time of the assignment but made later than the filing of the notice.

The decision in *Keeran v. Salley* seems clearly erroneous. Another interpretation of the above-quoted definition, much more consistent with the principle of notice filing on which the statute is based, is that the phrase "rights under an existing contract" adopts the substantive common-law rule followed by many American jurisdictions, including Texas, that rights which may arise under contracts not already in existence *at the date of assignment* cannot validly be assigned.<sup>9</sup> In other words, the statutory requirement that rights must arise under "existing contracts" to be protected might better have been construed in the *Keeran* case to mean that statutory protection extends to rights assigned under contracts

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<sup>5</sup> Comment 2, UNIFORM COMMERCIAL CODE §9-402.

<sup>6</sup> 244 S.W. 2d 663 (Tex. Civ. App. 1951).

<sup>7</sup> TEX. CIV. STAT. ANN. art. 260-1, §3(b) (Vernon, 1947).

<sup>8</sup> TEX. CIV. STAT. ANN. art. 260-1, §1(1) (Vernon, 1947).

<sup>9</sup> See 31 TEXAS L. REV. 63 (1952). It is difficult to state with certainty whether this substantive rule was followed by Ohio at common law. A dictum of the Ohio Supreme Court recognized as prevailing the rule that wages which

existing at the time of assignment whether or not such contracts were in existence at the date of the filing of the statutory public notice. Under the *Keeran* construction, the convenience of notice filing is destroyed since the filing of a new public notice would be required every time the lender took an assignment of rights arising under a contract entered since the date of the last notice.

The decision not only destroys the convenience provided by notice filing but does so without any corresponding benefit to third parties. The system of filing which results from the *Keeran* decision is a strange blend of notice filing and the type of filing required under chattel mortgage acts. Notice filing provides convenience for borrower and lender by requiring only infrequent filing of a general notice, but imposes on third parties the duty of inquiring further as to what specific assets of the borrower have already been collateralized. "Chattel mortgage" filing, in requiring a filing each time new collateral is given and in requiring the collateral to be identified in the public record, is less convenient for borrower and lender, but spares third parties the duty of inquiry beyond the public record. The system of filing resulting from the *Keeran* decision burdens lender and borrower with a requirement of frequent filing, but in requiring merely the continual refiling of the same general notice of assignment provides third parties with no more information than they would receive from one such notice.

The incorrectness of the court's decision is further indicated by the provision of the Texas statute (paralleled by a provision of the 1951 Ohio statute) that the maximum period of effectiveness of a public notice is three years.<sup>10</sup> Since very few contracts under which accounts will arise and be assigned are not completed within less than three years, the length of the statutory period indicates that the public notice was intended to protect assignment of rights under contracts entered subsequent to the filing of the notice.<sup>11</sup>

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might be earned under future employments, being a mere expectancy or possibility, were not assignable at law. *Rodijkeit v. Andrews*, 74 Ohio St. 104, 116, 77 N.E. 747 (1906). See also *Tolman v. Hyndman Steel Roofing Co.*, 6 Ohio N.P. 467 (1899). However, a later decision of the Supreme Court held that an assignment of an expectancy by an heir apparent or presumptive, although not enforceable at law, could be enforced in equity upon the death of the ancestor when the inheritance had become absolute. *Hite v. Hite*, 120 Ohio St. 253, 166 N.E. 193 (1929). It has been suggested in a subsequent appellate case that the *Hite* decision is of general applicability in the law of assignments and, accordingly, modifies the rule recognized in the *Rodijkeit* dictum. See *Diehl v. Interstate Loan Co.*, 57 Ohio App. 532, 15 N.E. 2d 170 (1937).

<sup>10</sup> TEX. CIV. STAT. ANN. art. 260-1, §4.

<sup>11</sup> See *supra* note 9, at 64. A peculiarly unfortunate aspect of the *Keeran* decision is that it was completely unnecessary. The case could have been decided on the ground that the assignment in question had not been made until after a garnishment had attached to the funds which were the subject of the assignment.

The court in the *Keeran* case made no reference to the fact that the Federal

In 1955 the Texas legislature amended the Texas Assignment of Accounts Receivable Statute to overcome the effect of the *Keeran* decision.<sup>12</sup> Since that action by the legislature, the *Keeran* decision has been followed by the Court of Appeals for the Fifth Circuit in *Republic National Bank v. Vial*,<sup>13</sup> the operative facts of which case preceded the effective date of the Texas amendment. The announcement of the *Vial* decision caused concern in commercial and banking circles in several states, including Ohio, whose assignment of accounts receivable statutes contained wording similar to that which was construed so unfortunately in the Texas cases. Recently, several of these states have amended their statutes to rule out any possibility of their being construed as the Texas statute was in the *Keeran* case.<sup>14</sup> Senate Bill No. 235 was intended to have this effect with respect to the Ohio statute.

Early last year a group of Ohio lawyers exchanged views as to whether the Ohio Assignment of Accounts Receivable Statute was in need of amendment to bar the possibility of a construction similar to that made of the Texas statute in the *Keeran* case. It was the consensus of this group that the statutory construction applied in the Texas cases was incorrect; and that the term "existing contract," as used both in Texas and Ohio statutes, incorporated the substantive rule that rights under future contracts are not presently assignable.<sup>15</sup> The group concluded, however, that because of the need for absolute certainty in commercial transactions, the Ohio statute should be amended to avoid the remotest

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District Court for the Southern District of Texas had earlier held that a public notice under the Texas statute protects all assignments made within its period of effectiveness, regardless of whether any rights assigned arose under contracts entered subsequent to the filing of the notice. *In re Cumings*, 99 F. Supp. 690 (S.D. Tex. 1951). The district court in the *Cumings* decision relied on certain language in a decision of the Court of Appeals for the Fifth Circuit, *Second National Bank v. Phillips*, 189 F. 2d 115 (5th Cir. 1951). The *Cumings* decision was eventually reversed by the Court of Appeals for the Fifth Circuit subsequent to the rendering of the *Keeran* decision, on grounds not here relevant. *United States v. Phillips*, 198 F. 2d 634 (5th Cir. 1952). However, in passing, the Court of Appeals noted that the view taken in the *Cumings* decision could no longer be maintained in the face of the *Keeran* case, and further suggested that the reliance of the district court on the earlier decision of the Court of Appeals in *Second National Bank v. Phillips*, *supra*, had been unjustified.

<sup>12</sup> Tex. Acts 1955, 54th Leg., c. 305, effective May 21, 1955.

<sup>13</sup> 232 F. 2d 785 (5th Cir. 1956).

<sup>14</sup> Colorado: Senate Bill No. 265, effective May 1, 1957; Florida: Fla. Acts 1957, c. 57-22, effective April 30, 1957; North Carolina: House Bill No. 340, effective May 1, 1957; Ohio: Senate Bill No. 235, effective September 7, 1957; Vermont: Vt. Acts 1957 No. 200, effective May 28, 1957.

See Moore and Kupfer, *Factor's Liens and Accounts Receivable*, 12 THE BUSINESS LAWYER 482 (1957).

<sup>15</sup> In Freedheim & Goldston, *Article 9 and Security Interests in Accounts, Contract Rights and Chattel Paper*, 14 OHIO ST. L.J. 69, 76 (1953), the term "existing contract" in the 1951 Ohio Statute is interpreted as incorporating this substantive rule.

possibility that the Texas cases might be followed by Ohio courts in the construction of the Ohio statute;<sup>16</sup> it prepared a draft of proposed amendments to achieve this result. The text of this draft was substantially identical to that eventually approved by the General Assembly as Senate Bill No. 235.

The Bill meets the problem of statutory construction presented by the *Keeran* case directly by an amendment to Ohio Rev. Code §1325.01(A) (1953), which defines the term "account receivable." This section, prior to the amendment, read:

"Account receivable" means a right to the payment of money for the performance of work or the rendering of of services, or for the sale, lease, or other transfer of chattel property, including both an existing right to immediate or future payment and a right to payment which may arise under an existing contract. . . .

It will be noted that this definition, like the definition in the Texas statute considered in the *Keeran* case, does not explicitly state the point of time at which rights or contracts under which rights may arise must be "existing" in order to be within the definition. The amendment to this section made by Senate Bill No. 235 states specifically that the relevant point of time is the time of assignment:

"Account receivable" means a right to the payment of money for the performance of work or the rendering of services, or for the sale, lease, or other transfer of chattel property, including both a right to immediate or future payment existing at the time of the assignment thereof and a right to payment which may arise under a contract existing at the time of the assignment of such right. . . .

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<sup>16</sup> It may be that the Texas statute, as it read at the time of the *Keeran* decision, is in some respects distinguishable from that of Ohio. Section 2 of the Texas statute stated:

"The assignment of any account or accounts may be protected by the execution and delivery by the assignor to the assignee of an instrument . . . assigning such account or accounts . . . and by the filing for record the 'Notice of Assignment' as hereinafter provided for." (emphasis added)

And Section 3 thereof provided:

"Whenever any person, firm or corporation assigns within this state by instrument in writing all or any one or more of his accounts receivable, there may be filed for record a 'Notice of Assignment' . . ." (emphasis added)

The language of the above sections, read in isolation, might suggest that the statute required a separate filing of a notice each time the assignor assigned one or more accounts. This result would, however, not correspond precisely to the result of the Texas cases, which read the statute as requiring a new filing only when the assignor assigns one or more accounts arising under a contract made since the date of the filing of the last notice. In any event, since the Texas decisions were based solely on the definition of "account receivable," which definition was extremely similar to that in the Ohio statute, the group of lawyers considering the matter concluded that it would be prudent to clarify the meaning of that definition in the Ohio statute.

The Bill makes a corresponding amendment to Ohio Rev. Code §1325.04(A) (1953), which sets forth the conditions under which an assignment of accounts receivable is protected. The first sentence of this Section prior to the amendment read:

A written assignment for value, signed by the assignor, becomes protected at the time the assignee, having previously or contemporaneously filed a notice of assignment, takes such assignment during the effective period of the notice.

That sentence has been amended by the Bill to read as follows:

An assignee of an account receivable is protected as to such account receivable if the assignment thereof is made in writing, for value, and during the effective period of an applicable notice of assignment which has been filed previously to or contemporaneously with the making of such assignment, whether or not such account receivable or the contract under which such account receivable may arise is in existence at the time of the filing of the applicable notice of assignment.

In summary, Senate Bill No. 235 makes it clear that a notice of assignment protects all written assignments for value made within the effective period of the applicable notice. Under the Assignment of Accounts Receivable Statute as amended, it is clearly unnecessary to file a new notice when an assignment is made under a contract which was concluded subsequent to the filing of a notice whose period of effectiveness has not yet expired. Finally, the bill retains and states more clearly the substantive rule adopted by the Ohio Assignment of Accounts Receivable Statute that an assignment of rights which may arise under a contract not in existence at the time of the assignment gives the assignee no rights as against persons other than the assignor.<sup>17</sup>

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<sup>17</sup> The amendment to the Texas statute, *supra* note 12, and the amendments to statutes of states other than Ohio, *supra* note 14, unlike the Ohio amendment, seem to present a substantial problem of construction on this point. It is possible to construe these amendments as having not merely met the immediate problem presented by the *Keeran* and *Vial* decisions but as having also abolished the substantive rule that rights under future contracts are not presently assignable. This possibility is created by the definition of "account receivable" in these amendments as "an existing or future right to the payment of money presently due, or to become due . . . under an existing contract or *under a future contract* entered into during the effective period of the notice of assignment." The term "future contract" is, to say the least, not expressly limited to contracts which are entered subsequent to the filing of the applicable notice *and which are in existence at the time of the assignment of rights arising under the contracts*.